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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-232

PACIFIC FIDELITY LIFE INSURANCE CO. and BANKERS MORTGAGE COMPANY OF CALIFORNIA,
Petitioners,

vs.

DAVID DEVOTO and CHARLES F. VOLK,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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I

OPINIONS BELOW

The decision by the Court of Appeals is now reported at 516 F.2d 1 and is set out in Appendix C to the Petition. (Pet. App. C, pp. 23-32).

II

QUESTIONS PRESENTED

Contrary to the assertions by the petitioners Bankers Mortgage Company ("Bankers Mortgage") and Pacific Fidelity Life Insurance Co. ("Pacific Fidelity"), the questions presented are:

1. Whether, *as a matter of law,* a corporation is free to use its corporate affiliation with another corporation to coerce and pressure its affiliate into refusing to deal with "outside" corporations, or, at the very least, granting a discriminatory priority on the affiliate's business without regard to the traditional competitive elements such as price, quality and marketability.

2. Whether, *as a matter of law,* a combination and conspiracy between a noninsurance company and an insurance company to restrain and eliminate competition for the purchase of a list of potential insurance customers is immunized from antitrust liability by reason of the McCarran-Ferguson Act.

3. Whether, *as a matter of law,* an intended victim of an antitrust violation, who is injured in the precise manner that the antitrust violators contemplated, lacks standing to sue by reason of the fact that the victim lacks privity of contract with the antitrust violators.

III

STATEMENT OF THE CASE

A. NATURE OF THE CASE AND RELEVANT PROCEEDINGS BELOW

This is a private antitrust suit brought by respondents, DeVoto and Volk, doing business as Market Placement Agency, ("DeVoto and Volk"), under Section 4 of the Clayton Act (15 U.S.C. § 15) alleging injury by reason of the petitioners' violations of Section 1 of the Sherman Act. (15 U.S.C. § 1).

The complaint was filed by DeVoto and Volk on July 15, 1970. Bankers Mortgage and Pacific Fidelity filed a motion to dismiss the complaint under Rule 12 F.R.Civ.P. on September 1, 1970, alleging that (1) the complaint failed to state a cause of action, and (2) DeVoto and Volk lacked standing to sue. (R. 14 et seq.). The District Court denied the motion from the bench on December 4, 1970, (R. 422), and Bankers Mortgage and Pacific Fidelity filed their answers denying the allegations on December 14, 1970. (R. 81). On April 4, 1972, Bankers Mortgage and Pacific Fidelity, less than one month before trial, filed amended answers alleging that (1) their acts did not take place in nor did they affect interstate commerce, and (2) their acts were immunized under the McCarran-Ferguson Act. On April 18, 1972, Bankers Mortgage and Pacific Fidelity filed motions under Rule 56 F.R.Civ.P. for summary judgment alleging that: (1) no genuine issue of material fact existed as to whether or not their acts (a) indicated an anticompetitive motive, purpose or effect, or (b) were in or affected interstate commerce; (2) DeVoto and Volk lacked standing to sue; and (3) the conduct was immunized. (R. 231). On April 27, 1972, DeVoto and

Volk filed their opposition and, in addition, moved under Rule 56 F.R.Civ.P. for a partial summary judgment alleging that no genuine issue of fact existed on the issue of Bankers Mortgage's and Pacific Fidelity's liability by reason of their admission of liability and the undisputed facts demonstrating an anticompetitive motive, purpose and effect. (R. 320, 321). On January 29, 1973, the District Court granted the motion by Bankers Mortgage and Pacific Fidelity, and denied the motion by DeVoto and Volk. Although the District Court found that DeVoto and Volk had standing to sue and that the acts were not immunized, the District Court found as a matter of law that there was no triable issue of fact with respect to whether the acts of Bankers Mortgage and Pacific Fidelity: (1) were done with an anticompetitive motive, purpose, intent or had such an effect; or (2) were in or affected interstate commerce.[1] (Pet. App. A, pp. 1-10). The District Court found that, *as a matter of law,* the acts of Bankers Mortgage and Pacific Fidelity were done "for business reasons" and "for reasons of their own which are not relevant here." (Pet. App. A, pp. 8, 9). Judgment was entered on January 30, 1973, (R. 411), and DeVoto and Volk took an appeal. On January 16, 1975, the Court of Appeals reversed the District Court and held that a question of fact existed as to whether the acts of Bankers Mortgage and Pacific Fidelity manifested an anticompetitive purpose or effect, and that the acts affected interstate commerce. (Pet. App. B). The Court of Appeals did not originally rule upon the issues of standing and immunization, on the ground that, "These rulings are not before us on

[1]Bankers Mortgage and Pacific Fidelity do not raise the interstate commerce issue in their Petition.

this appeal." (Pet. App. B, p. 14). Bankers Mortgage and Pacific Fidelity filed petitions for rehearing and suggestions for rehearing en banc. On May 15, 1975, the Court of Appeals issued its revised opinion and held, with respect to the standing and immunization issues, that "These rulings are affirmed for the reason stated by the district court." (Pet. App. C, p. 26). The petitions and suggestions were denied.

B. THE BASIC FACTS

Consistent with their practice in the Courts below, Bankers Mortgage and Pacific Fidelity have presented an extremely inaccurate recitation of the facts. Many material facts have been ignored, misstated, and even fabricated. Thus, it is necessary to state the facts as they are and not as the petitioners wish they were.

(1) Parties.

Respondent, David DeVoto conducted business under the firm name of Market Placement Agency located in Petaluma, California. Market Placement Agency was engaged in the business of providing specialty insurance programs throughout the Western States. Respondent Charles Volk was affiliated with Market Placement Agency as a general agent and representative for the sale of insurance.

Petitioners in this action are Pacific Fidelity Life Insurance Company and Bankers Mortgage Company of California, both of which were subsidiaries of the Transamerica Corporation during the relevant time period.

Pacific Fidelity is and has been engaged in the business of selling insurance throughout the United States. In 1968 Pacific Fidelity had more than $529 million of new life insurance sales, with a total life insurance in force at year end of more than $1.2 billion.

Bankers Mortgage Company is a mortgage banking company which makes all types of real estate loans in the State of California and the State of Nevada. In 1968, Bankers serviced a portfolio in excess of $787 million, representing over 48,000 individual mortgage loans. In 1968, Bankers processed $83 million in annual loan receipts.

The Transamerica Corporation is not a party to this action, but is the parent conglomerate of which the respondents were subsidiaries at all relevant times. Transamerica's various businesses include, among others, insurance, leisure time service, customer finance, commercial financing, real estate service, business service, mutual funds, educational service, international financing and manufacturing. In 1968, Transamerica had total revenues of $1.3 billion.

(2) The Evidence.

Mortgage protection insurance is basically insurance sold to the mortgagor to protect him in the event of death or disability. Bankers does not issue mortgage protection insurance policies. Instead, it provides mortgage protection insurance to its accounts pursuant to written agreements with companies which do offer mortgage protection insurance policies. At all times since 1964 when Bankers became affiliated with Transamerica Company, until 1970 when Pacific Fidelity was sold to a non-Transamerica

company, Bankers has dealt exclusively with Pacific Fidelity with respect to mortgage protection insurance. Bankers had a written agreement for mortgage protection insurance in effect with Home Owners Group Agency until late 1964, the same time that Bankers became a Transamerica subsidiary. Homeowners Group Agency was not a subsidiary of Transamerica. In 1964, a new agreement was negotiated for mortgage protection insurance with Pacific Fidelity which was at that time a subsidiary of Transamerica Corporation. This agreement, renegotiated from time to time, continued in effect until September 1, 1970, when Pacific Fidelity was sold. (Granger, TR. 13; Ex. 1)[2].

In the winter of 1967 and spring of 1968, Pacific Fidelity offered two kinds of mortgage protection insurance programs to mortgage customers of Bankers. Pacific Fidelity's experience in selling mortgage protection insurance indicated that they could expect 3% of the mortgagors solicited[3] on one program and 1.5% of the mortgagors solicited on the other program. (Laity, TR. 30; Exs. 4 and 5).

In approximately October or November of 1967, Mr. Harold Granger of Bankers was contacted by Charles Volk with a new proposal for the solicitation and sale of mortgage protection insurance. This policy was one written by American Home Assurance Company and involved the selling of accident and health policies to Bankers'

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[2]The citations given, other than those referring to the Record or the Transcript, are from the depositions and the exhibits introduced and marked in the depositions. The depositions and exhibits contained therein are part of the Record on Appeal. (R. 416, 418).

[3]The percentage of mortgagors solicited who purchase insurance is known as "penetration."

mortgage accounts. American Home is and was an established insurance company with an excellent reputation in the field of providing mortgage protection insurance. The American Home Program was admittedly superior to Pacific Fidelity's Mortgage Protection Insurance Policy in that among other things, it provided for the mortgage customers a 25-year benefit term as opposed to a 3-year benefit term as provided for in Pacific Fidelity's policy. The American Home proposal also provided a unique benefit to Bankers in that American Home offered to pay Bankers $1.25 for each eligible mortgagor that was available for solicitation by American Home. The American Home proposal was a unique and promising business opportunity for Bankers because it offered a product different from anything that Pacific Fidelity had to offer and the $1.25 per eligible mortgagor guaranteed a fixed sum to Bankers which had not been guaranteed under the Pacific Fidelity programs. (Granger, Ex. 2; Colwell, Ex. 2; Colwell, TR. 17; Keller, TR. 18; Granger, TR. 21). Another advantageous feature of the American Home proposal was its very conservative estimate of 10% penetration (Granger, TR. 56, 57) as compared with Pacific Fidelity's past experience of from 1½ to 3 percent penetration. The contract contemplated that American Home would service the accounts from the East. (Granger, Ex. 18; Volk, TR. 10). Pursuant to the agency agreement between the appellants, in California, and American Home, in New York, the appellants were to receive for their services of bringing the two companies together a specified percentage of the revenues received by American Home. (DeVoto, TR. 24; Exhibit 2). Like the agreement between Bankers and American Home, the agreement between appellants and

American was for a minimum of 2 years. (DeVoto, Exhibit 2).

On November 17, 1967, American Home wrote Harold Granger of Bankers and put in writing the basic terms outlined to Granger by the appellants. (Granger, Ex. 2).

On November 21, 1967, Bankers' Kent Colwell acknowledged the letter stating that, "your proposal appears quite attractive to us." (Granger, Ex. 3). The offer was admittedly quite superior to any program previously offered by Pacific Fidelity to Bankers (Colwell, TR. 17-20) and Bankers looked, "forward to a long and mutually profitable relationship."

On December 5, American Home sent the agreement to Bankers Mortgage for their inspection.

On December 6, Granger of Bankers attached the agreement to a memorandum sent to Bankers' officers. The memorandum (Granger, Ex. 7) notes Granger's caution that the agreement with American Home may "result in some conflict with our present associates." The "associates" were identified as the petitioner Pacific Fidelity.

The American Home proposal was analyzed by Bankers and discussed in the Management Committee. (Colwell, TR. 22). Drafts of the American Home proposal were circulated to various Bankers personnel and submitted to the legal counsel for review. The American Home Plan underwent some revision in an effort to ensure that it would be compatible with the existing Pacific Fidelity solicitation programs. The Board of Directors of Bankers wished to allow Pacific Fidelity to have a continuing opportunity to solicit for the first year following commencement of loan servicing. (Granger, Ex. 7, 8, and 9). The

American Home contract in its final form was signed by representatives of American Home in New York and Bankers in California on January 24, 1968. (Granger, Ex. 18).

In the meantime, Bankers had kept Pacific Fidelity and other Transamerica personnel informed as to their negotiations with American Home. In November of 1967, Harold Granger of Bankers revealed the nature of the American Home proposal to representatives of Pacific Fidelity at a meeting in Los Angeles. (Laity, TR. 21, 22).

In addition, in December of 1967, Mr. Harold Granger of Bankers Mortgage sent copies of the American Home Accident and Health Policy, the American Home Mortgage Agency Agreement, and American Home advertising material to both Edward Michael of Occidental Life Insurance Company, a Transamerica subsidiary, and Robert Coan of Pacific Fidelity. (Granger, Ex. 10, 12). Occidental replied:

> "Occidental cannot match Am. Home offer, especially in view of second solicitation, Bill Dandy cannot see Am. Home penetration sufficient to match."

Neither was Pacific Fidelity able to match American Home's competitive offer. (Colwell, TR. 30).

On January 12, 1968, Harold Granger wrote to Robert Coan, Vice President of the Special Projects Division of Pacific Fidelity, informing him that Bankers was proceeding to enter into the agreement with American Home. (Granger, Ex. 14). Harold Granger wrote to Robert Coan again on January 24, 1968. The letter states that Bankers' primary objective in entering into the American Home

contract is to realize income for Bankers during the low cycle mortgage market year. (Granger, Ex. 17).

On January 19, 1968, an interoffice memorandum of Pacific Fidelity admits that its program for Bankers had not changed since 1964 when Bankers became a Transamerica affiliate and the two began to do business. Pacific further admits in the memo that their program for Bankers was "tired" and "passe" and that "it could undoubtedly be improved." (Mutschler, Ex. 3).

On January 29th, Pacific Fidelity continued to note difficulties with its own program. (Laity, Ex. 3). In that interoffice memorandum, Don Laity states that a number of mortgagors of Bankers had returned cancelled Pacific Fidelity policies and that "I anticipate a banner month for cancellations."

As the problems increased at Pacific, Pacific on February 1st asked Bankers to amend the existing agreement, and asked for approval by Bankers not to accept advance commissions. In this memo which highlights Pacific's performance, the petitioner Pacific even admitted that increasing the rates to mortgagors serviced by Bankers would not cure the Pacific's bad performance. (Mutschler, Ex. 4).

On March 27, 1968 the agreement between Bankers and American Home is executed. In the cover letter, Bankers' Granger states:

> "We . . . are confident that we shall have a long and mutually profitable relationship." (Granger, Ex. 21).

Although Bankers had already signed a contract with American Home, Pacific Fidelity undertook to prepare several studies designed to induce Bankers Mortgage Com-

pany to break its contract with American Home. One such study was prepared by Mutschler and sent to M. D. Laity on April 5, 1968. (Mutschler, Ex. 6). The Mutschler memorandum of April 5th, 1968 was prepared at the request of Mr. Laity who took this memorandum and condensed it for presentation to Mr. Boddiger, President of Pacific Fidelity Life. (Laity, TR. 29, 34; Laity, Ex. 5). The memo ends by requesting Laity "to determine to what degree Bankers is locked into a contract with American Home."

The second page of the Pacific Fidelity "Yield Comparison" lists four "other considerations." The first of these considerations states:

> "All profits for both PFLI and BMC coming out of our combined effort, stay within the Transamerica family."

This consideration is consistent with the reciprocal dealing principal of the Transamerica family that subsidiaries should keep business within the Transamerica Corporation wherever possible. (Colwell, TR. 13; Keller, TR. 10; Boddiger, TR. 12; Laity, TR. 35). The second consideration mentioned is:

> "PFLI has more than a pure business interest in Bankers Mortgage Company."

Mr. Laity of Pacific Fidelity testified that this additional consideration was the result of the affiliate relationship between Bankers Mortgage Company and Pacific Fidelity Life. (Laity, TR. 36; Boddiger, TR. 22; Granger, TR. 57; Keller, TR. 24).

The Pacific Fidelity "Yield Comparison" (Laity, Ex. 5) was then shown to Bankers in a meeting documented in a letter dated April 19, 1968 to Harold Granger from

M. D. Laity. (Laity, Ex. 6). Laity states in that memo, that in light of the "considerations":

> "[I]t doesn't seem to be in your or our best advantage to continue with them (American Home)."

Two weeks later, on April 30, 1968, Pacific's Laity again writes Bankers to ascertain what Bankers new president, Kent Colwell, thought of Pacific's "analysis" and "considerations":

> "Naturally we are very interested because we want to continue as your exclusive insurance marketers. . . ." (Granger, Ex. 25).

On May 8th, American Home, unaware of the conversations continuing between Pacific and Bankers, writes Bankers setting out American Home's past experience. American notes that a minimum of 10% of those mortgagors contacted would purchase insurance, and that a comparable mortgage banker company serviced by American resulted in affirmative responses from 17½% of those mortgagors solicited. (Granger, Ex. 17). [This compared to Pacific's 3% and 1½%.]

On May 21st, after an independent comparison between the American and Pacific programs, Bankers initially refused to break the signed contract with American. (Granger, Ex. 28). From its own self-interest, American's program was quite superior. Bankers wrote:

> "Because of our family connection, we have endeavored to review this as fairly as possible, exploring all the pros and cons, both within our own management and with our Board of Directors. We have concluded that we should not attempt to abrogate the agreement with American Home."

The important reasons for staying with American's competitive program were the approximately $50,000 commission advance under the American Home program, and Pacific Fidelity's poor penetration which the letter states is only 4.26% as compared with approximate 20% sale of other mortgage banking company insurance programs. Indeed, Bankers notes that if American,

> "does produce the results they anticipate, it could serve to sharpen our (Bankers) own competitive edge."

This was so in spite of the fact that preferential treatment is given to Transamerica or family members:

> "[W]hile it is our goal, insofar as possible, to keep business within the Transamerica family; there may, nevertheless, be situations in which introducing an outside factor can be beneficial."

Bankers had been gracious in changing agreements with Pacific to offset Pacific's poor past performances:

> "In turn, we hope you will be sympathetic at times to taking new looks at ways of doing things.
>
> • • •
>
> "I trust that you understand our position and that you will continue to work closely together for mutual benefit."

Just three days after Bankers detailed "explanation" to Pacific why American's program was so superior and why Bankers "should not attempt to abrogate" the American contract, Pacific convinced Bankers to send copies of all of the solicitation material supplied by American to Pacific Fidelity. (Granger, Ex. 29).

On May 28th, in a Pacific interoffice memo, Pacific outlines its plan to have Bankers breach its contract with American. (Laity, Ex. 10). The memo notes that Bankers, "still feel they should not abrogate their agreement with American." Pacific then proceeds simply to copy American's program:

> "This will put us in the position of duplicating the offer made to Bankers by American Home. . . ."

Although Bankers initially refused to abrogate the contract in spite of the expressed policy of keeping business within the Transamerica family wherever possible (Granger, Ex. 28), sometime between May 28, 1968 and June 21, 1968, Bankers decided to break the agreement with American Home and enter into a duplicative agreement with Pacific Fidelity Life. As stated by Mr. Granger, the only prerequisites Pacific Fidelity had to meet to give effect to the conspiracy to eliminate "outside" competition was (a) matching the American Home offer, and (b) providing Bankers Mortgage Company with a Hold Harmless Agreement. (Granger, TR. 64, 65). In fact Bankers assisted Pacific Fidelity in duplicating the American Home offer by providing Pacific Fidelity with copies of the American Home policy and the American Home solicitation materials. (Granger, Ex. 29). There was no benefit conferred on Bankers by reason of the conspiracy; to the contrary, Bankers knowingly incurred liability for the breach and jeopardized its reputation for keeping contracts. On the other hand, Pacific maintained its exclusivity, and the purpose of the conspiracy, to keep the business in the Transamerica "family" and exclude "outsiders" was accomplished by simply "matching" competition and holding Bankers harmless for its complicity in the conspiracy.

On June 21st, citing "pressure from above" (Granger, Ex. 26), Bankers notifies American that the contract will not be honored.

On June 25th, American tells the respondents that Bankers will not honor the signed contract:

> "Granger called today. I met with him and he said because of pressure from PF the deal is off. I've bought about two weeks time to try and collect thoughts and get back to him. Please advise next move. I'm rather uptight about what to do." (Granger, Ex. 30).

On July 2nd, Bankers and Pacific Fidelity plan the execution of the program. Bankers concludes its letter by stating:

> "In the meantime, there is still some fight left in the American Home people. I will keep you advised." (Granger, Ex. 31).

Pacific Fidelity Life program, designated 029, was copied directly from the American Home policy, the American Home solicitation materials, and incorporated the $1.25 per mortgagor commission advance of the American Home program. In actuality, even if all terms of both the American Home and Pacific Fidelity Plans were identical, it would be to Bankers' best interest to continue with American Home because both plans featured a 25% commission at the end of the first year, and this would result in more money for Bankers Mortgage Company because of American Home's higher projected penetration percentage.

On July 18th, Bankers memorializes the understanding between itself and Pacific Fidelity "based upon your matching the agreement we have with the American Home

Group." (Granger, Ex. 32). Bankers concludes by reminding Pacific of its promise:

> "[T]o indemnify and hold Bankers harmless against any expense which may be incurred by reason of our unilateral abrogation of the Mortgage Agency Agreement between Bankers and the American Home Group. We should like this indemnification in view of the indefinite knowledge we have concerning the reaction of the American Home Group and the Market Placement Agency [respondents] to this abrogation."

Bankers' insistence that Pacific Fidelity execute the Hold Harmless Agreement admits that Bankers knew that they were impairing the legal rights of both American Home and Market Placement Agency when they broke their contract with American Home. In fact when Pacific Fidelity requested permission of Bankers to go ahead with the program before the Hold Harmless Agreement was executed (Laity, Ex. 18). Mr. Granger did not wish Pacific Fidelity to continue with the program until the Hold Harmless Agreement had been executed. (Granger, TR. 75, 76).

In obtaining the Hold Harmless Agreement, Pacific's Laity wrote Pacific's chief executive officer and advised that although it was clear the contract was broken and that suit could be brought

> "The maximum award they could get would be the anticipated 2 year profits they expected." (Laity, Ex. 19).

In the same memo, Laity writes to his superior that it was Granger's opinion that American, although upset,

> "understood the situation, particularly since Pacific Fidelity Life was a Company affiliated with Bankers Mortgage and the Transamerica Corporation."

Pacific specifically notes the concern of the petitioners of, "the possibility of litigation being brought," by the respondents. *(ibid.)*

However, Laity argues that the probable damages from a lawsuit are offset by Pacific's maintenance of its exclusive control over the large market serviced by Bankers:

> "Quite frankly, our worst foreseeable loss could be the profits we earned from a 2 year period but we would still gain, due to the fact that we would retain the Bankers Mortgage Account which is a valuable one." (Laity, Ex. 19).

In the same memo, Pacific's chief executive officer agrees, and recommends that Laity prepare a letter of recision for Bankers to be approved by Transamerica Finance Corporation.

Bankers then prepared and sent a formal recision letter to Mr. Barrata of American Home on August 2, 1968. (Granger, Ex. 34). Pacific Fidelity also prepared a draft of a recision letter at the request of George Boddiger, President of Pacific Fidelity Life. (Laity, Ex. 19). The draft composed by Mr. Laity states in part:

> "We do regret any inconvenience caused you, but appreciate your understanding our wish to conduct this activity with our affiliated company, Pacific Fidelity Life, . . ." (Laity, Ex. 20).

The Laity recision letter was never sent. Instead on August 2nd, Bankers sent their own letter which admittedly concealed the fact that the decision to abrogate was not based on the merits of competition but rather on the fact of affiliation with Transamerica. (Granger, Ex. 34). As Pacific's Laity states regarding Granger's abrogation letter:

> "There are logical reasons outlined in Mr. Granger's letter for this decision, none of which point to any outside influences from either Pacific Fidelity or Transamerica Corporation." (Laity, Ex. 38, enclosure).

On the same date, Bankers expresses its concern to Pacific about respondents DeVoto and Volk:

> "[I]f we fail to complete our agreement with American Home for such amounts as they feel they would have earned under the agreement if we were to go ahead with it." (Granger, Ex. 35).

Sensing that Bankers may have second thoughts about their complicity in the abrogation, Pacific sends on August 7th, the signed Hold Harmless Agreement. This is conditioned on Bankers' agreement:

> "[T]hat no commitments, agreements, or actions will be made with American Home or Market Placement Agency [respondents] that involve the subject matter of this Hold Harmless Agreement." (Granger, Ex. 36.)

This being accomplished, Pacific then tries to change its obligations under the agreement with Bankers. (Granger, Ex. 38). Bankers responds on August 19 that,

> "[W]e had continuously assumed that the arrangement for the new plan would be identical."

and that:

> "As I told you, this was our principal incentive in cancelling with American Home and so inviting detrimental opinions concerning our integrity and possible litigation." (Granger, Ex. 39).

The agreement between Bankers Mortgage Company and American Home Assurance Company was to be in effect a minimum of two years. The Agreement was to be non-cancellable for two years, and after two years could be terminated by either party upon 30 days' written notice. The contract between Market Placement Agency and American Home provided that Market Placement Agency would receive commissions during the first two years and then the contract would be in effect from year to year thereafter so long as the insurance plan in question remained in effect. It was contemplated by all parties that the agreement would have a minimum duration of two years and would continue after the two year period developing into a long and profitable relationship.

IV

ARGUMENT

Notwithstanding the petitioners' distorted statement of the facts and tortured analysis of the law, the respondents respectfully submit that there is no reason consistent with Rule 19 of this Court to grant the petition; and accordingly, the petition should be denied.

A. CONTRARY TO THE PETITIONERS' ASSERTIONS, THE DECISION BELOW NEITHER CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS NOR CREATES UNSOUND NEW DOCTRINE AS TO THE ANTITRUST SIGNIFICANCE OF BUSINESS DEALINGS AMONG AFFILIATED CORPORATIONS.

The petitioners assert that all that is present in this case is one affiliate corporation doing business with another affiliate corporation. From that half truth, they argue that the Court below held that it was unlawful for affiliated corporations "without more" to do business with each other; and, therefore, according to the petitioners, the Court below has announced a rule of law that affiliation in and of itself creates antitrust liability. As is clearly evident from the recitation of the facts above, the petitioners, in reaching their premise, have either ignored or misstated basic material facts and in some cases have even fabricated facts of their own.

As pointed out above, the principal facts are:

1. DeVoto and Volk brought Bankers of California and American Home of New York together;

2. Bankers accepted American Home's offer, and signed a minimum two year contract;

3. Pacific Fidelity "pressured" Bankers into breaking its contract with American Home;

4. Bankers initially resisted out of its own self-interest and despite its "goal, insofar as possible, to keep business within the Transamerica family";

5. Bankers relented, and broke the contract;

6. The sole reason for breaking the contract was the use by Pacific Fidelity of mutual affiliation with Trans-

america, coercively applied and not for any competitive reason; and

7. Pacific Fidelity only had to "duplicate" or "match" American Home's offer, and sign a Hold Harmless Agreement with Bankers insulating Bankers from the anticipated litigation by American Home, DeVoto and Volk, or both.

Thus, the Court below noted:

> "The record clearly supports the contentions that: (1) the American package was superior to that finally offered by Pacific, and (2) Bankers based its decision to abrogate the American contract and to resume its exclusive relationship with Pacific upon its decision to keep the business . . . within the Transamerica corporate group." (Pet. App. C, pp. 29, 30).

This case gives rise to the inference, if not conclusively shows, that "one of the congeries of anticompetitive practices at which the antitrust laws are aimed", *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 594 (1965), was the sole basis for Pacific Fidelity successfully pressuring and coercing Bankers into breaching its contract with American Home. As such, the corporate affiliation between Bankers and Pacific Fidelity was:

> "'[A]n irrelevant and alien factor' intruding into the choice among competing products, creating at the least 'a priority on the business at equal prices'. *International Salt Co. v. United States*, 332 U.S. 392, 396-397." *FTC v. Consolidated Foods Corp., Supra.*

Petitioners argue that all that is present here is the exercise of a business decision. They argue, as they did in the District Court, that there is no question of fact.

In support of their argument in this Court, they cite a number of cases for the proposition that corporate affiliation standing alone does not violate the anti-trust laws. This obviously does not meet the issue; for present in this case is an unwilling affiliate who had first chosen on the competitive merits to deal with an outside corporation. After that independent decision had been made, Pacific Fidelity then resorted to pressure and coercion by reason of its affiliation. Thus, the issue is not the fact of affiliation, but rather its misuse and abuse for the obvious purpose of fencing out outside competition. This abuse is a factor over which an outsider such as American has no control, and with which he cannot hope to compete. None of the cases cited by the petitioners are contrary to the decision of the Court below and the Supreme Court Opinion cited therein.

B. CONTRARY TO THE PETITIONERS' ASSERTIONS THE DECISION BELOW DOES NOT CONFLICT WITH OTHER COURTS OF APPEALS WITH RESPECT TO McCARRAN-FERGUSON ACT IMMUNITY.

Again avoiding the facts, Bankers and Pacific Fidelity argue in a vacuum. Among the facts ignored are:

1. Bankers is not in the insurance business;

2. The competition under consideration was for Bankers' customer list;

3. Pacific Fidelity used its affiliation with Bankers to coerce and pressure Bankers into rejecting American's superior program and re-establishing Pacific Fidelity's exclusive arrangement; and

4. The effect and purpose of the combination was to black list all "outside" non-affiliated competitors.

It is not the law, as argued by Bankers and Pacific Fidelity, that insurance companies are *ipso facto* immune from the antitrust laws or that the mere presence of an insurance company in a conspiracy to restrain trade immunizes all the other participants in the conspiracy.

The most that the petitioners can do in order to frame an immunity issue is simply to convert the facts to their pleasing. Thus, the premise of the petitioners' argument before this Court is that the Court below erroneously "believed that Bankers was in the business of insurance because its main business is money lending." (Petition App., p. 18). Petitioners then argue as a fact that Bankers was in the insurance business.

The respondent respectfully submits that there is no reason why this Court should grant the petition on the petitioners' assertions of what the facts should be rather than what they were.

C. THE DECISION BY THE COURT BELOW DOES NOT CONFLICT WITH OTHER COURTS OF APPEALS ON THE QUESTION OF STANDING TO SUE.

Consistent with their approach, Bankers and Pacific Fidelity purposely avoid material facts and attempt to fabricate other facts by mere assertion and *ipse dixit.*

The respondents, DeVoto and Volk, brought American Home and Bankers Mortgage together. (Pl. App. Br., p. 10). DeVoto and Volk contracted with American Home for a percentage of the commissions earned by American Home in its dealings with Bankers. (DeVoto, TR. 24; Ex. 2).

Both Bankers and Pacific Fidelity were well aware that their combination to destroy the contract with American Home would injure DeVoto and Volk. Thus, when Bankers joined the combination with Pacific Fidelity, Bankers sought and received from Pacific Fidelity a Hold Harmless Agreement:

> "[I]n view of the indefinite knowledge we have concerning the reaction of the American Home Group and the Market Placement Agency [DeVoto and Volk's d/b/a designation] to this abrogation." (Granger, Ex. 32).

In justifying the Hold Harmless Agreement to his superior, Laity of Pacific Fidelity wrote that:

> "Mr. Granger [Bankers] was somewhat concerned about the possibility of litigation being brought against Bankers Mortgage by the Market Placement Agency." (Laity, Ex. 19).

Pacific Fidelity then reasoned that the Hold Harmless Agreement insulating Bankers from the anticipated litigation was worth the maintenance of its exclusive with Bankers:

> "Quite frankly, our worst foreseeable loss could be the profit we earned from a 2 year period but we would still gain, due to the fact that we would retain the Bankers Mortgage Account which is a valuable one." (Laity, Ex. 19).

Bankers then sent the Hold Harmless Agreement to Pacific Fidelity, noting its concern that DeVoto and Volk would probably sue, even if American Home would not:

> "[I]f we fail to complete our agreement with American Home for such amounts as they [DeVoto and Volk] would have earned under the agreement if we were to go ahead with it." (Granger, Ex. 35).

Pacific Fidelity executed the agreement and cautioned Bankers that:

> "[W]e wish to be sure it is understood by Bankers Mortgage that no commitments, agreements, or actions will be made with American Home Assurance Company or Market Placement Agency that involve the subject matter of this Hold Harmless Agreement." (Granger, Ex. 26).

There can be little doubt that, as a matter of fact, the petitioners knew that their conduct would directly injure the respondents. On this point, this Court has spoken often. See, *Perkins v. Standard Oil Co. of Calif.*, 395 U.S. 642; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100; *Continental Ore v. Union Carbide & Carbon*, 370 U.S. 690.

The most that petitioners can do on this issue is to engage in a semantical argument about a so called "target area" test and a "direct injury" test. Petitioners then go on to argue from rather thin circumstance. Under either analysis, the respondents here were both in the "target area" and the victims of "direct injury."

D. IF ANYTHING, THE COURT BELOW SHOULD HAVE GRANTED THE MOTION FOR PARTIAL SUMMARY JUDGMENT BY RESPONDENTS DeVOTO AND VOLK.

DeVoto and Volk moved the District Court for partial summary judgment on the ground that the undisputed facts, mostly those admitted by Pacific Fidelity and Bankers Mortgage, showed that the petitioners purposely

engaged in anticompetitive conduct and knew that their acts constituted a restraint trade. DeVoto and Volk relied upon this Court's decisions in *International Salt Co. v. United States,* 332 U.S. 392 and *Northern Pac. R. Co. v. United States,* 356 U.S. 1. In those cases this Court granted summary judgment in favor of the antitrust plaintiff on the ground that the activity complained of violated the antitrust laws, as a matter of law. In each case priorities were granted to the defendants by reason of "irrelevant and alien factors" which intruded into the free market place.

Thus, if any error was committed below, it was that the lower courts failed to grant a partial summary judgment in favor of the respondents DeVoto and Volk. The lower courts should have held that the petitioners conduct violated the antitrust laws, as a matter of law, and then should have remanded for trial the issue of the amount of damages.

CONCLUSION

For the reasons stated, respondents respectfully submit that the petition and writ of certiorari should be denied.

Dated, San Francisco, California,
September 12, 1975.

Respectfully submitted,
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